TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 715

THE ATLANTIC LUMBER COMPANY, APPELLANT,

vs.

COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS

APPEAL FROM THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

FILED JANUARY 24, 1936.

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IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

Common Law

SUFFOLK COUNTY:

THE ATLANTIC LUMBER COMPANY, Appellant

vs.

COMMISSIONER OF CORPORATIONS AND TAXATION, Appellee

Appeal from Decision of the Board of Tax Appeals

Before Board of Tax Appeals

PETITION—Filed June 1, 1933

A. The taxes in controversy are Massachusetts Corporate Excise Taxes. The Appellant filed an application for abatement of these taxes with the Appellee, a copy of which is attached hereto and marked Exhibit A. This application was denied by a notice of disallowance dated May 3, 1933. A copy of this notice of disallowance is attached hereto and marked Exhibit B. The amount of the taxes in controversy is $2,512.33, which was assessed for the year 1932 based on income received in the calendar year 1931 and the balance sheet of the Appellant as at December 31, 1931. These taxes were paid on October 20, 1932.

B. The facts upon which the Appellant relies as the basis of its appeal are as follows:

[fol. 2] 1. The Appellant is a foreign corporation, organized and existing under and by virtue of the laws of the State of Delaware, engaged in the business of dealing in lumber at wholesale.

2. The Appellant was, during the years 1931 and 1932, a foreign corporation carrying on business in part in the Commonwealth of Massachusetts and its business so car-

ried on in Massachusetts was exclusively interstate commerce.

The Appellant, during the years aforesaid, maintained sales offices at Boston, Massachusetts and Buffalo, New York. The Boston Office was used as a headquarters for three salesmen, who solicited orders in Massachusetts and the other New England States, and for carrying on correspondence and other natural business activities in connection with the receipt of orders and shipments of goods for the New England States. No orders were taken for less than car load lots of lumber and these orders after being passed upon were sent either to the office at Buffalo, New York, where your Appellant's distributing yard for the New England States is located, or to a mill of some subsidiary situated outside the Commonwealth, and the lumber was shipped in car load lots direct to the customers from such points situated outside the Commonwealth. Remittances from customers in the New England States were made to the Boston Office. No samples or other merchandise were kept in this Commonwealth and no goods were delivered from any store or warehouse in Massachusetts and all goods shipped into Massachusetts were shipped in car load lots from the lumber yards of your Appellant situated outside the Commonwealth. The only tangible property of your Appellant in Massachusetts during the said years was its office furniture and salesmen's automobiles valued at less than ten thousand dollars ($10,000.00). [fol. 3] Bank accounts were maintained in Buffalo, New York; Brooklyn, New York; New York City, New York; Boston, Massachusetts; and Toronto, Canada. The corporate books and records were kept at the office in Boston, Massachusetts, and some of the directors meetings were held there.

4. That, notwithstanding a protest by your Appellant that it was not liable to taxation under Chapter 63 of the General Laws of the Commonwealth of Massachusetts, as amended, the Appellee assessed to your Appellant for the year 1932 an excise tax of $2,512.33. This tax was computed by the Appellant in the following manner:

Amount of Tax Measured by Net Income

Average value of tangible property in Mass., $8,734. Divide this by average value of all tangible property, $1,557,400.; multiply resulting fraction by $56,347.* (1/3 of $169,043*, Net Loss for Year)	=	$314.80*
Wages, salaries, etc., assignable to Mass., $92,899. Divide this by amount of all wages, salaries, etc., $209,640.; multiply resulting fraction by $56,347.* (1/3 of $169,043*, supra)	=	24,970.00*
Gross receipts assignable to Mass., $278,551. Divide this by gross receipts from all business, $2,172,110.; multiply resulting fraction by $56,347.* (1/3 of $169,043*, supra)	=	7,226.00*
Net Loss Assignable to Massachusetts		$32,510.80*
Total according to income		None

[fol. 4] Amount of Tax Measured by Corporate Excess

Loss assignable to Massachusetts, as above shown, $32,510.80. Divide this by $169,043. (entire apportionable net loss); multiply resulting fraction by $3,086,009. (used for total intangible assets and computed by adding the value of stocks in subsidiaries to the value of intangible assets other than securities). This yields $593,532., which was taken as the value of intangible assets assignable to Massachusetts. The tangible assets, $7,682., were added and $601,214 became the total accepted value of assets assignable to the State.

Cash value of the company's capital stock was fixed at $3,506,625; all assets, $4,187,748.00. Divide $601,214. by $4,187,748.; multiply resulting fraction by $3,506,625; the result is $503,429. From this the value of motor vehicles in Massachusetts of $964.00 was deducted leaving $502,465.

* Denotes figures in red ink on Original Copy.

—the "corporate excess." Five dollars per thousand upon this is $2,512.33.

Total Assessment for 1932 ..... $2,512.33.

5. That your Appellant on December 31, 1931, owned and held shares of stock in the following corporations organized under the laws of Tennessee, Louisiana and South Carolina as permanent investments:

Stocks	Book Value December 31, 1931
Vestal Lumber Co., Incorporated in Tennessee	$1,180,647.46
Clayton Timber Co., Incorporated in Louisiana	100,000.00
Consolidated Lumber Co., Incorporated in South Carolina	33,859.46*
Total	$1,246,788.00

[fol. 5] The Vestal Lumber Co. and the Consolidated Lumber Co., during the years 1931 and 1932, were engaged in the business of cutting timber and manufacturing lumber. Neither company owned any property or transacted any business in the Commonwealth of Massachusetts during 1931 and 1932. The Clayton Timber Co. owns timber lands in Louisiana and transacted no business in the Commonwealth of Massachusetts during 1931 and 1932.

6. That, nevertheless, the Appellee in determining the excise tax upon your Appellant for the year 1932, included a portion of the value of said stocks of the above named as assets employed in business within Massachusetts.

C. The contentions of law which the Appellant intends to raise are as follows:

1. The excise levied on foreign corporations by the provisions of Chapter 63 of the General Laws of Massachusetts, as amended, does not apply to foreign corporations engaged, to the extent of their activities and business carried on in Massachusetts, exclusively in interstate or foreign commerce.

---

* Denotes figures in red ink on Original Copy.

2. The Appellant, to the extent which it was carrying on business in Massachusetts in the years 1931 and 1932, was engaged exclusively in interstate commerce and was not subject to said excise.

3. The imposition of the said tax against the Appellant is in violation of the Constitution of the United States in that the Appellant is denied the rights and privileges [fol. 6] assured to it therein, and in that the said tax so assessed against the Appellant is a direct burden on interstate commerce and constitutes an unlawful regulation of interstate commerce in contravention of the Commerce Clause embodied in Section 8 of Article 1 of the Constitution of the United States.

4. The said tax so assessed against the Appellant is in violation of the Federal Constitution in that it levies a tax upon the property of the Appellant situated without the limits of the Commonwealth of Massachusetts, thereby depriving the Appellant of its property without due process of law in contravention of the 14th Amendment of the Constitution of the United States.

5. The inclusion of the securities set out in paragraph five among the assets employed in business within Massachusetts was not authorized by the statute and that if authorized by the statute would be none the less illegal and void as an attempt to reach by taxation property not within the jurisdiction of the Commonwealth of Massachusetts in violation of the 14th Amendment of the Constitution of the United States.

6. The Appellant draws in question the validity of said Chapter 63 of the General Laws, as amended, on the ground that the said statute is repugnant to the Constitution of the United States in that it levies a tax that is a direct burden on interstate commerce in contravention of the Commerce Clause embodied in Section 8 of Article 1 to the Constitution of the United States.

7. The Appellant draws in question the validity of the said Chapter 63 of the General Laws, as amended, on the [fol. 7] ground that it levies a tax against property of the Appellant situated without the limits of the Commonwealth of Massachusetts, thereby depriving the Appellant of its property without due process of law in contravention of

the 14th Amendment to the Constitution of the United States.

Wherefore the Appellant respectfully prays that this Board may hear its appeal and determine that the Appellant made an overpayment of Corporate Excise Taxes in the amount of $2,512.33 for the year 1932 and that the Appellant is entitled to reimbursement of said taxes with interest at six percent (6%) per annum from October 20, 1932 in accordance with the provisions of Section 71, Chapter 63 of the General Laws.

The Atlantic Lumber Company, by its attorney,
Robert C. McKay.

The name and address of the Attorney for the Appellant, for the purpose of service of papers in connection with this appeal, are as follows: Robert C. McKay, Esq., 80 Federal Street, Boston, Massachusetts.

[File endorsement omitted.]

[fol. 8] EXHIBIT "A" TO PETITION

Form 355 H. 1932. Revision.

THE COMMONWEALTH OF MASSACHUSETTS:

Department of Corporations and Taxation
Henry F. Long, Commissioner
Division of Corporations
237 State House, Boston

Application for Abatement of Excise

May not be made after sixty days from the date of notice of assessment.

A tax bill is a notice of assessment.

Name of Corporation, Atlantic Lumber Company,
Post Office Address, 1 State Street, Boston Massachusetts.

The above named corporation hereby makes application to the Commissioner of Corporations and Taxation for an abatement of its excise tax for the year 1932, to the extent and for the reasons set forth below:

State in detail the claims of the corporation, giving all the facts relating thereto.

Regulation 10001 provides that "The application shall set forth specifically the facts upon which the applicant relies, together with a statement of the contentions of law which the applicant desires to raise, and abatement will be granted only upon grounds so specifically set forth."
If a hearing is desired on this application, this fact should be stated.

(1) Your claimant is a corporation organized under the laws of the State of Delaware, engaged in the business of dealing in lumber at wholesale. During the years 1931 and 1932 it carried on business in part in the Commonwealth of Massachusetts, but its business so carried on in Massachusetts was exclusively interstate commerce. Form 355-F, stating in detail the nature of the business of your claimant, is on file in your office. Your claimant contends, therefore, that the total tax of $2,512.33 assessed to it for the year 1932 has been illegally assessed and should be abated.

[fol. 9] (2) On December 31, 1931 your claimant owned the following securities:

Miscellaneous Bonds and Stocks	$426,996.00
Stock of Subsidiaries	1,246,788.00
Mortgages	133,000.00

The miscellaneous bonds and stocks represents an investment of the surplus funds of your claimant which was not employed in any business within the Commonwealth.

The Stock of Subsidiaries represents the following book value of the subsidiaries on December 31, 1931:

Stocks	Book Value December 31, 1931
Vestal Lumber Co., Incorporated in Tennessee	$1,180,647.46
Clayton Timber Co., Incorporated in Louisiana	100,000.00
Consolidated Lumber Co., Incorporated in South Carolina	33,859.46*
Total	$1,246,788.00

* Denotes figures in red ink on Original Copy.

The Vestal Lumber Co. and the Consolidated Lumber Co. are engaged in the business of cutting timber and manufacturing lumber. Neither company transacted any business in the Commonwealth of Massachusetts during 1931 and 1932. The Clayton Timber Co. owns timber lands in Louisiana and transacted no business in the Commonwealth of Massachusetts during 1931 and 1932.

The mortgages of $133,000.00 represents a mortgage on lumber mill property in Arkansas City, Arkansas.

In computing the corporate excess of your claimant a portion of the book value in the above assets has been included as assets employed in business within the Commonwealth on December 31, 1931. It is contended that no part of the value of these assets should be so included.

(3) A hearing is desired on this application.

[fol. 10] EXHIBIT "B" TO PETITION

Copy

THE COMMONWEALTH OF MASSACHUSETTS:

Department of Corporations and Taxation

State House, Boston

Division of Corp's, Harold S. Lvon, Director

May 3, 1933.

Henry F. Long, Commissioner. Edward A. Doherty, Francis O. P. Carlson, Deputies.

Atlantic Lumber Company, 1 State Street, Boston, Massachusetts.

In re 1932 Excise Tax

GENTLEMEN:

After careful consideration of the application for abatement of the excise tax assessed upon the above named corporation, notice is here given that the request for an abatement of the tax in whole or in part is hereby denied.

Very truly yours, Henry F. Long, Commissioner, by G. M. Stevens (Signed.)

GMS:GMS.

[fol. 10-a] COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

SUPREME JUDICIAL COURT

I, Charles S. O'Connor, Clerk of said Court, hereby certify that the attached is a true copy of the 1932 corporation excise tax return which was attached to the Appeal of the Atlantic Lumber Company v. Commissioner of Corporations and Taxation, Docket No. 33642 Law, Supreme Judicial Court for the County of Suffolk.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this eighth day of February in the year of our Lord one thousand nine hundred and thirty-six.

Charles S. O'Connor, Clerk. (Seal.)

[fol. 10-b] February 7, 1936.

I, Henry F. Long, Commissioner of Corporations and Taxation of The Commonwealth of Massachusetts, certify that the attached is a true copy of the 1932 corporation excise tax return filed by the Atlantic Lumber Company with me pursuant to the provisions of General Laws, Chapter 63, Section 40. The figures shown in blue pencil were not a part of the original return as filed but are notations which were made by the assessing clerk. The copy does not include accompanying schedules.

Attest.

Henry F. Long, Commissioner of Corporations and Taxation.

I, Ernest W. Ricker, hereby certify that the attached is a true copy of the 1932 Excise Tax Return which was admitted as Exhibit No. 1 at hearing on January 4, 1934, in the appeal of The Atlantic Lumber Company vs. Commissioner of Corporations and Taxation, Docket No. 2633, before Board of Tax Appeals.

Attest.

Ernest W. Ricker, Assistant Clerk. (Seal.)

(Here follow 4 photos, folios 10-c, 10-d, 10-e, 10-f)

Page 1

Form 355B
1932 Revision

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORPORATIONS AND TAXATION

FOREIGN / FOREIGN MANUFACTURING } CORPORATION EXCISE TAX RETURN 1932

GENERAL LAWS, CHAPTER 63, AS AMENDED.
To be filed not later than the tenth day of April, 1932
With Henry F. Long, Commissioner of Corporations and Taxation, Division of Corporations, 237 State House, Boston.

RECEIVED	ASSESSED	
L M APR 12 1932 L	2	To the treasurer of Atlantic Lumber Company, The 1 State St. Boston, Mass. 177
PENALTY	AUDITED BY Comp. Desk Field	
	Mach	
DISTRIBUTION / LOCAL ✓	DO NOT WRITE ABOVE THIS LINE	
	READ INSTRUCTION SHEET	

Statement of The Atlantic Lumber Company (Name of corporation) Delaware (State where organized) Wholesale Lumber (Kind of business, specify in detail)

Post office address One State St., Boston Mass.

Location of principal office One State Street (Street and Street Number) Boston (City or Town) Massachusetts (State)

Name of Treasurer George E. French Location of Massachusetts Office One State St., Boston (Street and Street Number) (City or Town)

Did this corporation in its Federal Income Tax Return consolidate its net income with another corporation? No

If so, give names of corporations which participated in filing such Federal Return

Return of Income for the taxable year ending December 31, 1931 193

SCHEDULE A. NET INCOME AS REPORTED IN LAST FEDERAL RETURN DUE PRIOR TO APRIL 1, 1932

Item No.	GROSS INCOME										
1.	Gross Sales from Trading or Manufacturing, $2172110.30; Less Returns and Allowances, $91693.84; Net Sales					$	2	080	416	46	
2.	Less Cost of Goods Sold:										
	(a) Inventory at beginning of year	$	1	459	685	82					
	(b) Merchandise bought for sale		1	352	494	24					
	(c) Cost of manufacturing or producing goods: Salaries and Wages, $; Other Costs, $; Total			None							
	(d) Total of lines (a), (b), and (c)	$	2	812	180	06					
	(e) Less inventory at end of year			953	313	04	1	858	867	02	
3.	Gross Profit from Trading or Manufacturing (Item 1 minus Item 2)						$		221	549	44
4.	Gross Profit from Operations Other Than Trading or Manufacturing. (State source of income):							None			

(c) Cost of manufacturing or producing goods: Salaries and Wages, $; Other Costs, $; Total			None								
(d) Total of lines (a), (b), and (c)	$	2	812	130	06						
(e) Less inventory at end of year			953	313	04	1	858	867	02		
3. Gross Profit from Trading or Manufacturing (Item 1 minus Item 2)						$	221	549	44		
4. Gross Profit from Operations Other Than Trading or Manufacturing. (State source of income):											
(a)							None				
(b)											
(c)											
5. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds							38	025	86		
6. Rents							None				
7. Royalties							None				
8. Profit from Sale of Real Estate, Stocks, Bonds, and other Capital Assets							102	578	67		
9. Dividends on Stock of Domestic Corporations							30	093	15		
10. Other Income (including dividends received on stock of foreign corporations). (State nature of income):											
(a) Exchange								261	74		
(b) Fire Insurance collected							2	849	82		
(c) Tax Refunds - State Mass.							6	259	76		
11. TOTAL INCOME IN ITEMS 3 TO 10										$	246 461 10
DEDUCTIONS											
12. Compensation of Officers (Attach copy of Federal Schedule C)						$	62	100	00		
13. Rent on Business Property							10	782	05		
14. Repairs; Salaries and Wages, $; Other Costs, $; Total								None			
15. Interest							28	654	46		
16. Taxes							5	023	10		
17. Losses								None			
18. Bad Debts							13	141	71		
19. Dividends (Attach copy of Federal Schedule H)							30	093	15		
20. Depreciation (resulting from exhaustion, wear and tear, or obsolescence). (Attach Copy of Federal Schedule I)							11	979	13		
21. Depletion of Mines, Oil and Gas Wells, Timber, etc								None			
22. Other Deductions Not Reported Above. (Explain below, or on separate sheet):											
(a) Salaries and wages (not included in Item 2, 12, or 14 above)							147	540	17		
(b) Net Loss for 1929-1930 (Submit schedule)								None			
(c) Operating Expenses							96	973	56		
(d) Adjustments various Accounts							9	216	68		
(e)											
23. TOTAL DEDUCTIONS IN ITEMS 12 TO 22										$	415 504 31
24. NET INCOME (Item 11 minus Item 23) (LOSS IN RED)										$	169 043 21

SCHEDULE B. NET LOSS ADJUSTMENT—VERIFICATION OR CORRECTION OF SCHEDULE A

1. Net income as shown in Schedule A, Item 24, as verified or corrected (See instruction sheet)	$ 169 043 21
2. Net loss of previous year or years deducted in Schedule A	$ None
3. Total of Items 1 and 2	$ 169 043 21

10-6

DO NOT OMIT SUPPORTING SCHEDULES

1932
Page 2

READ INSTRUCTION SHEET

SCHEDULE C. CORPORATE EXCESS (AT DATE OF BALANCE SHEET SEE TABLE IV)

TABLE I — CAPITAL STOCK

	Amount Authorized	Amount Issued and Outstanding	Amount Paid in Thereon (If Installment Stock)	Number of Shares Issued	Par Value Per Share	Market Value Per Share
Common	$2,925,000.00	$1,925,000.00	-----	19,250	$100.	None
1st Pref.	1500 Shares	75,000.00	-----	1,500	None	None
2nd Pref.	None	None		None	None	None

Date of Charter _____ Date when corporation commenced business in Mass. _____

If stock is listed on Stock Exchange, give name of Exchange _____

If stock is not listed on Stock Exchange, state last four sales, giving the information called for in Table II. Do not include "wash" sales.

TABLE II — SALES OF STOCK

	Date of Sale	Number of Shares	Price per Share	Public or Private Sale?		Date of Sale	Number of Shares	Price per Share	Public or Private Sale?
Com. .					1st Pref.				
Com. .					2nd Pref.				
1st Pref.					2nd Pref.				

TABLE III — NET EARNINGS—LAST FIVE YEARS

Year Ended	Net Income (Loss in Red)	Deductions	Additions	Net Earnings (After Taxes)	Income Received from Securities	Dividends Declared: Common	First Preferred	Second Preferred
19 27	$ 245,802.73	$33,898.37	$ ----	211,904.36	$	None %	None %	None %
19 28	143,239.97	27,241.33	----	115,998.64		None %	None %	None %
19 29	258,380.24	41,519.67	11,288.56	228,149.13		%	None %	None %
19 30	36,338.56	288,162.92	26,369.59	225,454.77		%	None %	None %
19 31	269,043.27	179,513.84	30,093.15	313,463.90		None %	$2.50	None %
Total	514,718.29	570,336.13	67,751.30	1,094,970.80				
Average	$ 102,943.66	See Instruction Sheet Under Table III for Required Schedule		$ 218,994.16	$	%	%	%

TABLE IV. BALANCE SHEET AS OF December 31 1931

(Insert date—See instructions)

(AT CLOSE OF TAXABLE YEAR, IF INCOME TO BE REPORTED ON PAGE 1, OTHERWISE AS OF APRIL 1, 1932)

ASSETS	Books of Account	*Value (Actual)
1. Real Estate	121,937.14	121,937.14
2. Machinery used in conduct of the business	------	
3. Motor Vehicles	13,077.15	13,077.15
4. Tools, Equipment and Teams	3,832.55	3,832.55
5. Furniture, Fixtures and Supplies	9,578.71	9,578.71
6. Total of Items 1 to 5 (inclusive)	148,425.55	148,425.55
7. Merchandise	953,313.04	953,313.04
Other Tangibles		
8.		
9.		
10. Total of Items 7, 8 and 9	953,313.04	953,313.04
11. Notes Receivable	78,428.47	78,428.47
12. Accounts Receivable	1,067,537.52	978,009.47

DO NOT GROUP THESE ITEMS

*VALUES, IF ANY, MUST BE EXPLAINED

ANSWER EVERY ITEM

ANSWER EVERY ITEM

4. Tools, Equipment and Teams &c.		3	832	55						3	832	55				
5. Furniture, Fixtures and Supplies		9	578	71						9	578	71				
6. TOTAL OF ITEMS 1 TO 5 (inclusive)						148	425	55						148	425	55
7. Merchandise		953	313	04						953	313	04				
Other Tangibles 8.																
9.																
10. TOTAL OF ITEMS 7, 8 and 9						953	313	04						953	313	04
11. Notes Receivable		78	428	47						78	428	47				
12. Accounts Receivable	1	067	537	52						978	009	47				
13. Securities		426	996	00						426	996	00				
14. Cash		222	787	15						222	787	15				
Other Intangibles 15. Stocks-Subsidiaries	1	246	788	00						1 246	788					
16. Mortgages		133	000	00						133	000	00				
17.													3	086	009	09
18. TOTAL OF ITEMS 11 TO 17 (inclusive)					3	175	537	14					1	839	221	09
TOTAL ASSETS (Books of Account)					4	277	275	73		(Value Actual)			2	940	953	58

4,187,747.66

LIABILITIES	Books of Account				Actual			
1. Mortgages								
2. Notes Payable (Do not enter here notes secured by real estate)		590	000	00		590	000	00
3. Accounts Payable			932	11			932	11
Other Liabilities (Naming Items) 4.								
5.								
6.								
7. TOTAL (Items 1 to 6, incl.)		590	932	11		590	932	11
RESERVES (Follow Instruction Sheet) 8. Bad A/cs		64	528	05				
9. Taxes			725	00			725	00
10. Contingencies		25	000	00		591	657	11
11. Capital Stock	2	000	000	00	2	000	000	00
12. Surplus Including Profit and Loss†	1	596	090	57		889	605	34
TOTAL LIABILITIES	4	277	275	73	3	481	262	45

A. Are the books-of-account values for Items 1 to 5, inclusive, of the table of assets, based on cost less depreciation? Ans._____ If not, state the basis of said values upon a schedule attached to the return.

B. Are the books-of-account values for Items 1 to 17, inclusive, of the table of assets, without deduction for reserves of any kind? Ans._____ If reserves have been deducted, attach a memorandum stating the amount of reserves and the basis upon which the reserves were determined.

†If book surplus differs from actual surplus and profit and loss accounts submit a schedule showing a reconciliation.

*State the basis upon which actual values have been determined, explaining difference from books-of-account (Attach schedule if space below is not sufficient)

Reserves deducted Stocks Subsidiaries omitted

State any other facts that are material in determining "the fair value of the capital stock."

10-d

DO NOT OMIT SUPPORTING SCHEDULES

Attach Schedules Here

READ INSTRUCTION SHEET

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SCHEDULE C. — Continued

(ALL FIGURES IN TABLES B, C AND D AS OF DATE OF BALANCE SHEET, Table IV)

The following Schedules are required:
Page 1.—Items A 12, A 19 and A 20
Page 2.—Table III, Deductions, Additions, Table IV A and B
Page 3.—Table A1, A2 and A3
Page 4.—Items D 2, D 3, D 4, D 9, D 7 (b) or D 16 (b) and D 18

TABLE A. DETERMINATION OF ALLOCATING PERCENTAGE

			DIVIDE (a) by (b) to obtain decimal—Carry out decimal at least six places
1. (a) Average value (actual) of tangible property in Mass.	8,734.00	=	.00561
(b) Average value (actual) of all tangible property	1,557,400.00		
2. (a) Wages, salaries, etc., assignable to Mass.	92,899.00	=	.44314
(b) Total wages, salaries, etc.	209,640.00		
3. (a) Gross receipts assignable to Mass.	278,551.00	=	.12824
(b) Gross receipts from all business	2,172,110.00		
4. TOTAL OF ITEMS 1, 2 and 3—DIVIDE BY THREE		*3)	.57699
5. Allocating percentage (express in decimal)			.19233

*NOTE. — If only two of above proportions apply, substitute 2. If only one of above proportions applies, substitute 1.
DO NOT FAIL TO OBSERVE INSTRUCTIONS ON ACCOMPANYING SHEET.

SUPPORTING SCHEDULES

The following schedules, where applicable, must be made in support of Table A:

TABLE A-1: In this schedule show the method used in determining the average values for Item 1 (*a*) and (*b*), describing the assets and stating their value.

TABLE A-2: In this schedule specify the location of the premises to which wages are assignable and the amount assigned to each such place, whether within or without Mass.

TABLE A-3: In this schedule state the amount of sales and receipts assigned to each place of business, whether within or without Mass.

TABLE B. ASSETS EMPLOYED IN BUSINESS WITHIN MASSACHUSETTS (See Instruction Sheet)

Col. 1 CITY OR TOWN IN WHICH CORPORATION OWNS TANGIBLE PROPERTY	Col. 2 REAL ESTATE SEE NOTE	Col. 3 MACHINERY SEE NOTE	Col. 4 MOTOR VEHICLES SEE NOTE	Col. 5 MERCHANDISE	Col. 6 OTHER TANGIBLE PROP. SEE NOTE	Col. 7 AMOUNT OF MORTGAGE ON *Real Estate* REPORTED IN COL. 2
Boston	$	$	$ None	$	$6,718.00	$
Malden			886.		None	
Milton			78.		None	
Totals	$	$	$ 964.	$	$6,718.00	$

ANSWER EVERY ITEM

a Total of columns 2, 3, 4, 5 and 6 above	3 086 009 09	$7,682.00
b Total intangible assets (Item 18, Table IV)	$1,839,221.00	
c Item 5, Table A (Insert allocating percentage and multiply)	× .19233	593 532 13
d Intangible assets employed in Mass. (enter also in outside column)	$ 353,737.00	353,737.00
e Total of Items a and d		$361419.00 601214.13

ANSWER EVERY ITEM

Totals	$	$	$ 964.	$	$6,718.00	$

a Total of columns 2, 3, 4, 5 and 6 above	3 086 009 09	$7,682.00	
b Total intangible assets (Item 18, Table IV)	$1,839,221.00		
	× .19233		
c Item 5, Table A (Insert allocating percentage and multiply)		593 532 13	
d Intangible assets employed in Mass. (enter also in outside column)	$ 353,737.00	353,737.00	
e Total of Items *a* and *d*		$361,419.00	6 012 14. 13

NOTE. — In column 2, include works, structures, real estate, poles, underground conduits, wires and pipes owned within Massachusetts and subject to local taxation. In column 3, include *only* such machinery as is *owned* by the corporation within Massachusetts, and as is *subject to local taxation.* Other machinery owned by the corporation, if any, should be included in column 6. Include in column 4, motor vehicles of every type. Dealers in motor vehicles should not include stock in trade as this should be placed in column 5. Include in column 6, tools, equipment, furniture, fixtures, supplies, teams and any other tangible property situated in Massachusetts not reported in columns 2, 3, 4 and 5.

QUESTIONS SUPPLEMENTAL TO TABLE B

1. Does the real estate consist of buildings on leased land? Ans._____ If so, state whether or not the buildings are removable under the terms of the lease_____. 2. Is the real estate assessed to the corporation? Ans._____ If not, state to whom assessed _____. 3. Is the machinery assessed to the corporation? Ans._____. If not, state to whom assessed_____

TABLE C VALUE OF TANGIBLE PROPERTY SITUATED OUTSIDE MASSACHUSETTS

Col. 1 City or Town and State	Col. 2 Real Estate	Col. 3 Machinery	Col. 4 Motor Vehicles	Col. 5 Merchandise	Col. 6 Other Tangible Prop.
Buffalo, N.Y.	$121,937.14	$	$12,113.15	$442,759.38	$ 6,693.19
Arkansas City, Ark.				145,683.41	
Clayton, La.				272,439.11	
Cowards, S.C.				36,541.35	
Various Points in Canada				55,889.79	
Totals	$121,937.14	$	$12,113.15	$953,313.04	$ 6,693.19

TABLE D. SECURITIES HELD IN MASSACHUSETTS (Include both Taxable and Non-Taxable)

Col. 1 Amount of Bonds or No. of Shares Stock	Col. 2 Complete Description of Securities by Name and Class or Issue	Col. 3	Leave this Column Vacant
		$	
Total		$	

DO NOT OMIT SUPPORTING SCHEDULES

10-6

1932
Page 4

READ INSTRUCTION SHEET

SCHEDULE D. ALLOCATION OF INCOME

1. Net income as shown in Schedule B, Item 3		$169,043.21	
2. Interest included in Item 1, other than that described in Item 10 below	$ 86,864.72		
3. Dividends included in Item 1,	None		
4. Gains from the sale of capital assets exclusive of those described under Item 9 below. (See Instruction Sheet)	102,578.67		
5. Total of Items 2, 3 and 4		$ 15,713.95	
6. Difference between Items 5 and 1 (enter also in outside column)		$153,329.26	$153,329.26
Items 7 and 8 to be answered only by Foreign Manufacturing Corporations carrying on business solely in Massachusetts			
7. (a) Average fair cash value of machinery owned and used in manufacture in Mass. $ ____ / (b) Average value of total assets employed in Mass. $ ____ × Item 6=			$
8. Difference between Items 7 and 6 = income taxable at 2½%			$
Items 9 to 17 to be answered only by Corporations carrying on business outside Massachusetts			
9. Gains from the sale of tangible capital assets situated within Mass.		None	
10. Interest from: Mass. corporations (except Trust Companies); associations, partnerships or trusts having transferable shares and having a principal place of business in Mass.; Mass. inhabitants		1,161.14	
11. Total of Items 9 and 10 (enter also in outside column)		$1,161.14	$ 1,161.14
12. Difference between Items 11 and 6 = remainder to be allocated		154,490.40	
13. Item 5, Table A, Schedule C. (Insert Allocating Percentage and multiply) If a consolidated statement of the income of two or more corporations, attach a memorandum establishing the allocating percentage on the basis of consolidated factors and use this percentage in lieu of the percentage established in Table A.		.19233	
14. Income allocable to Mass. (Enter also in outside column)		29,713.14	29,713.14
15. Totals of Items 11 and 14			30,552.00
Item 16 to be answered only by Foreign Manufacturing Corporations			
16. (a) Average fair cash value of machinery owned and used in manufacture in Mass. $ None / (b) Average value of total assets employed in Mass. $ ____ × Item 15=			None
17. Difference between Items 16 and 15=income taxable at 2½%			None
18. (a) Total dividends paid Massachusetts inhabitants for year ending Dec. 31, 1931. $ 3,750.00	(b) 5% of same.	(See Instruction Sheet)	$ 187.50

SUPPORTING SCHEDULES

The following Schedules, where applicable, must be made in support of Schedule D, and firmly attached to page three of this Return.

SCHEDULE D 2 and 3: Submit an itemized schedule indicating the sources from which interest and dividends were received.

SCHEDULE D 4 and 9: Submit a detailed schedule of *capital* assets sold (not stock in trade), describing same and giving location of

16. (*a*) Average fair cash value of machinery owned and used in manufacture in Mass. $ None × Item 15=			None
(*b*) Average value of total assets employed in Mass. . . . . .$			
17. Difference between Items 16 and 15=income taxable at 2½%			None
18. (*a*) Total dividends paid Massachusetts inhabitants for year ending Dec. 31, 1931. . . . $3,750.00	(*b*) 5% of same.	(See Instruction Sheet)	$ 187.50

SUPPORTING SCHEDULES

The following Schedules, where applicable, must be made in support of Schedule D, and firmly attached to page three of this Return.

SCHEDULE D 2 and 3: Submit an itemized schedule indicating the sources from which interest and dividends were received.

SCHEDULE D 4 and 9: Submit a detailed schedule of *capital* assets sold (not stock in trade), describing same and giving location of such of said assets as are tangible.

SCHEDULE D 7 (*b*) or 16(*b*): Submit a schedule describing the assets and stating their value and location.

SCHEDULE D 18: See Instruction Sheet. Read Item 18 of the Instruction Sheet.

SUPPLEMENTAL STATEMENT

1. Did the corporation, during the year above reported for, own or rent premises outside Mass. for the transaction of business? Ans. Yes

2. If so, state when such premises were first rented and the location of the same Buffalo, N.Y. 1902

3. Did the corporation derive its profits principally from the ownership, sale, rental or use of real estate or tangible personal property? Ans. No 4. If so, state the amount of gross receipts assignable to Mass. $

CHANGES WITH RESPECT TO FEDERAL NET INCOME

Has the corporation received notification of any change in the amount of net income as determined by the Federal Government with respect to any previous year, return of which was required to be made under the laws of Massachusetts?* Ans. ..... If so, state in the space below the amount of net income as finally determined. *See Instruction Sheet

Year Ended	19	19	19	19	19	19	19
Amount	$	$	$	$	$	$	$

STATEMENT UNDER PENALTIES OF PERJURY

(Read Carefully Before Signing)

I, the treasurer (or *other principal officer*) of the above named company, state under the penalties of perjury that I have carefully examined the foregoing return, and from such information as I have been able to obtain, that the items of income as set forth in Schedule A are a true copy of such items as they were included in its last return of income due prior to April 1, 1932, and made to the Collector of Internal Revenue, that, as adjusted, verified or corrected by Schedule B, said items are true and accurate statements and that all other items, statements and all schedules in this return contained, including the accompanying schedules and statements, are true and accurate in each and every particular.

No part of the debts of this corporation as set forth in this return has been incurred nor has any office, warehouse or other place of business been maintained in a state other than this commonwealth for the purpose of reducing the amount of taxes to be paid by said corporation. **This statement is made under the penalties of perjury.**

Signed this 11th day of April 1932

Signature of treasurer or other principal officer Geo. E. French

Title of office, as for example "President" or "Treasurer" Treasurer

Payment on account may be made at time of filing this return.

Under Chapter 187 of the Acts of 1926 the OATH BEFORE A MAGISTRATE IS *NOT REQUIRED.*

DO NOT OMIT SUPPORTING SCHEDULES (SEE TOP OF PAGE 3)

20m-1-'32 No. 4201-2a

[fol. 11] BEFORE BOARD OF TAX APPEALS

ANSWER—Filed June 22, 1933

Now comes the Commissioner of Corporations and Taxation, appellee, and makes answer as follows:

(a)

The appellee admits that the appellant seasonably made application for abatement of an excise assessed the appellant in the amount of $2,512.33, such excise being measured entirely by corporate excess as of December 31, 1931, no portion of said tax being based upon income. The appellee admits that under date of May 3, 1932, the appellee notified the appellant that the application was denied. The appellee admits that the tax was paid in full October 20, 1932. The appellee denies each and *and* every material allegation, if any, of paragraph A of the petition not herein expressly admitted or which is in any way inconsistent with this answer.

The appellee admits that the appellant is a foreign corporation organized and existing under and by virtue of the laws of the State of Delaware and that it is engaged in the business of dealing in lumber at wholesale, but the appellee denies any imputation, if any, in the petition to the effect that dealing in lumber at wholesale constitutes the sole business of the appellant.

The appellee admits that the appellant during the years 1931 and 1932 was a foreign corporation carrying on business in The Commonwealth of Massachusetts. The appellee denies that the business so carried on in Massachusetts was exclusively interstate commerce.

The appellee admits that the appellant during the years aforesaid maintained sales offices at Boston, Massachusetts and Buffalo, New York. The appellee admits that the Boston office was used as headquarters for at least three salesmen, who solicited orders in Massachusetts and other New England states and that said office was used for carrying on correspondence and other natural business activities in [fol. 12] connection with the receipt of orders and shipments of goods for the New England states. The appellee denies any imputation, if any, in the petition that the appellant used said office at Boston solely for the purpose

above set forth. The appellee is ignorant as to whether no orders were taken for less than carload lots of lumber and as to whether these orders after being passed upon were sent either to the office at Buffalo, New York or to a mill of some subsidiary situated outside the Commonwealth and as to whether the lumber was shipped in carload lots direct to the customers from such points situated outside the Commonwealth, and leaves the appellant to prove its allegations with respect thereto insofar as material, if at all. The appellee is ignorant as to whether the appellant's distributing yard for the New England states is located at Buffalo, New York and leaves the appellant to prove its allegations with respect thereto insofar as material, if at all. The appellee admits that remittances from customers in the New England states were made to the Boston office. The appellee is ignorant as to whether no samples or other merchandise were kept in this Commonwealth and as to whether no goods were delivered from any store or warehouse in Massachusetts and as to whether all goods shipped into Massachusetts were shipped in carload lots from the lumber yards of the appellant situated outside the Commonwealth and leaves the appellant to prove its allegations with respect thereto insofar as material, if at all. The appellee is ignorant as to whether the only tangible property of the appellant in Massachusetts during the said years was its office furniture and salesmen's automobiles and as to whether the value of such property was less than $10,000 and leaves the appellant to prove its allegations with respect thereto insofar as material, if at all. The appellee is ignorant as to whether the appellant maintained bank accounts in Buffalo, New York, Brooklyn, New York, New York City and Toronto, Canada, and leaves the appellant to prove its allegations with respect thereto insofar as material, if at all. The appellee admits that the appellant maintained bank accounts in Boston, Massachusetts. The appellee admits that the corporate books [fol. 13] and records of the appellant were kept at the office in Boston, Massachusetts and that some, if not all, of the directors meetings were held there.

The appellee admits that the appellee assessed the appellant in the year 1932 an excise tax amounting to $2,512.33, all of which was based upon corporate excess employed in Massachusetts by the appellant as of De-

cember 31, 1931. The appellee says that in the computation of said excise the value of the capital stock of the appellant was found to amount to $3,506,626, that the value of its assets employed in Massachusetts was found to amount to $601,214, and that the value of all its assets was found to amount to $4,187,748. The appellee admits that in determining the amount of intangible assets employed in the Commonwealth by the appellant he followed Ruling 2505 of the Rules and Regulations issued by the appellee pursuant to Section 47 of Chapter 63 of the General Laws and that pursuant to said ruling he found 19.233% of intangibles found to have a value of $3,086,009.09 to be so employed in Massachusetts which amounted to $593,532.13. This sum added to the sum of $7,682 which was found to be the value of the tangible assets employed in Massachusetts constituted the above sum of $601,214, found to be the value of the assets employed in Massachusetts. The appellee in the computation of said assessment further found that the appellant was entitled to a deduction on account of motor vehicles amounting to $964. He accordingly determined the value of the corporate excess employed in Massachusetts to amount to $502,465, which at $5.00 per $1,000 produces a tax of $2,512.33. The appellee denies each and every material allegation, if any, in paragraph 4 of the statement of facts upon which the appellant relies as set out in the petition which is not herein expressly admitted or which is in any way inconsistent with this answer.

The appellee admits that the appellant on December 31, 1931 owned and held shares of stock in the Vestal Lumber Co., the Clayton Lumber Co. and the Consolidated Lumber Co. as set forth in paragraph 5 of the statement of facts [fol. 14] upon which the appellant relies in the petition. The appellee is ignorant as to whether said shares of stock were held as permanent investments and as to whether the book values as of December 31, 1931 were as alleged in the petition and leaves the appellant to prove its allegations with respect thereto insofar as material, if at all. The appellee is ignorant as to whether the Vestal Lumber Co. and the Consolidated Lumber Co. during the years 1931 and 1932 were engaged in the business of cutting timber and manufacturing lumber and leaves the appellant to prove its allegations with respect thereto insofar as material,

if at all. The appellee is ignorant as to whether neither company owned any property or transacted any business in the Commonwealth of Massachusetts during 1931 and 1932 and leaves the appellant to prove its allegations with respect thereto insofar as material, if at all. The appellee is ignorant as to whether the Clayton Lumber Co. owns timber lands in Louisiana and as to whether it transacted no business in the Commonwealth of Massachusetts during 1931 and 1932 and leaves the appellant to prove its allegations with respect thereto insofar as material, if at all.

The appellee admits that the appellee in determining the excise tax of the appellant here in question, as before in this answer stated, followed the provisions of Ruling 2505 hereinbefore referred to. The appellee denies each and every material allegation, if any, of paragraph 6 of the statement of facts upon which the appellant relies as set out in the petition not herein expressly admitted or which is in any way inconsistent with this answer.

The appellee says that paragraph 1 of the statement of the contentions of law contains no allegation of fact. The appellee denies that the appellant during the years 1931 and 1932 was engaged exclusively in interstate commerce to the extent that it was carrying on business in Massachusetts and further denies that the appellant was not subject to the excise assessed.

The appellee denies that the imposition of said tax is in violation of the Constitution of the United States for the [fol. 15] reason that the appellant is denied the rights and privileges assured to it therein or for the reason that the said tax assessed against the appellant is a direct burden on interstate commerce or for the reason that it constitutes an unlawful regulation of interstate commerce in contravention of the commerce clause embodied in Section 8 of Article I of the Constitution of the United States, or for any other reason whatsoever.

The appellee denies that the tax assessed against the appellant is in violation of the Federal Constitution for any of the reasons set forth in paragraph 4 of the contentions of law stated in the petition and further denies that the excise is a tax upon the property of the appellant either within or without the limits of the Commonwealth of Massachusetts. The appellee further denies that the tax deprived the appellant of its property without due process

of law in contravention of the fourteenth amendment to the Constitution of the United States.

The appellee denies that there was included in the assets employed in business within the Commonwealth more than a fractional part of the value of the securities and further denies that insofar as the value of the securities was included among said assets so employed there was any violation of the authority granted by the statute. The appellee further denies that the inclusion authorized by the statute was illegal and void for the reasons set forth in paragraph 5 of the contentions of law stated in the petition.

The appellee denies that Chapter 63 of the General Laws, as amended, is repugnant to the Constitution of the United States in that it levies a tax that is a direct burden on interstate commerce in contravention of the commerce clause embodied in Section 8 of Article I of the Constitution of the United States.

The appellee denies that said Chapter 63 of the General Laws is invalid on the ground that it levies a tax against [fol. 16] property of the appellant situated without the limits of the Commonwealth of Massachusetts thereby depriving the appellant of its property without due process of law in contravention of the fourteenth amendment to the Constitution of the United States. The appellee further answering says that said Chapter 63 of the General Laws in no way levies a tax that is a direct burden on interstate commerce in contravention of the commerce clause embodied in Section 8 of Article I of the Constitution of the United States and the appellee further says that said Chapter 63 of the General Laws does not levy a tax against property situated without the limits of the Commonwealth of Massachusetts and does not deprive the appellant of its property without due process of law in contravention of the fourteenth amendment to the Constitution of the United States.

(b)

The appellee relies on the facts as set forth under (a) and (c) of this answer as well as those set forth under (b) of this answer. The appellee further relies upon any facts which may be adduced at any hearing of this appeal. The appellee says that the value of the capital stock of the ap-

pellant was at least as great as determined by him for the purpose of the original assessment, that by reason of the failure of the appellant to complete its tax return he cannot now determine whether the value as so determined is less than the true value and accordingly the appellee reserves the right if such fact shall later appear to so contend. The appellee says that the principal place of business of the appellant is in Massachusetts; that the appellant there maintains its executive and managerial office; that the officers of the appellant are chiefly connected with such Massachusetts office and from that office supervise and direct all business and financial affairs of the appellant; that the appellant engages in business which is not interstate in its character as well as business of an interstate character; all of which business, both interstate and non-interstate, is supervised and directed and subject to the con- [fol. 17] trol of the officers and directing management at the Boston office. The appellee says that a portion of the business of the appellant is that of holding the securities of and directing the affairs of subsidiary corporations, all of which business is done by officers and others at the Massachusetts place of business. The appellee further says that a very substantial part of the assets of the appellant consists of securities and investments and that the business of holding, buying, selling and receiving and disbursing in dividends the income from these securities and investments is carried on at the Massachusetts place of business of the appellant. The appellee further says that the appellant carries on a large local business in New York all of which is subject to the supervision, direction and control of the officers and management in the principal place of business in Boston, Massachusetts. The appellee further says that the wages assignable to Massachusetts and the receipts assignable to Massachusetts in accordance with the provisions of Chapter 63 of the General Laws of this Commonwealth were erroneously stated in the tax return of the appellant and that the true amount of the wages and of the receipts assignable to Massachusetts is greater than as stated in said tax return; that a much larger percentage of business is carried on in Massachusetts than is indicated by said return and a much larger amount of intangible assets is employed in Massachusetts than is stated to be so employed in the tax return or than was determined by the appellee, tenta-

tively relying upon said return, to be so employed in making the original assessment; and that the business situs of the major portion, if not at all, of the intangible assets of the appellant is in Massachusetts; and that the corporate excess employed by the appellant in Massachusetts greatly exceeds the amount heretofore assessed. Wherefore, the appellee says that not only is the appellant not aggrieved by the assessment made by the appellee, but that the appellant is subject to an additional tax assessable as provided in Chapter 63 of the General Laws of this Commonwealth.

[fol. 18]

(c)

For purposes of original assessment and tentatively relying upon the tax return of the appellant, the appellee found that the value of the capital stock as of December 31, 1931 amounted to $3,506,626. He found the value of the assets employed in Massachusetts amounted to $601,214, all as more fully hereinbefore set forth under (a) of this answer. The appellee found the value of the total assets to amount to $4,187,748. He found that the appellant was entitled to a deduction on account of motor vehicles amounting to $964. He accordingly found the value of the corporate excess employed in this Commonwealth to amount to $502,465 and that the tax thereon amounted to $2,512.33, all as more particularly hereinbefore set forth. The appellee now finds that the full amount of the tax imposed by Chapter 63 of the General Laws of this Commonwealth was not assessed and that the appellant is subject to an additional tax, all as more particularly hereinbefore set forth.

(d)

The appellant made no request for any ruling of law and accordingly the appellee made no ruling of law.

(e)

The usual place of business of the appellee is Room 239, State House, Boston, Massachusetts.

Henry F. Long, Commissioner of Corporations and Taxation, Appellee.

[File endorsement omitted.]

[fol. 19] BEFORE BOARD OF TAX APPEALS

REQUEST FOR RULINGS OF LAW—Filed Jan. 18, 1934

Now comes the Appellant, by its attorney, Robert C. McKay, and respectfully moves this honorable Board to adopt the following as its rulings of law in the above entitled cause:

1. The excise levied on foreign corporations by the provisions of Chapter 63 of the General Laws of Massachusetts, as amended, does not apply to foreign corporations engaged, to the extent of their activities and business carried on in Massachusetts, exclusively in interstate or foreign commerce.

2. The Appellant to the extent which it was carrying on business in Massachusetts in the years 1931 and 1932 was engaged exclusively in interstate commerce and was not subject to the excise imposed by Chapter 63 of the General Laws.

3. A foreign corporation engaged in the business of dealing in lumber at wholesale which maintains no stock of lumber in Massachusetts and whose orders are filled by shipment direct to the customer in car load lots from stocks situated outside Massachusetts, is engaged exclusively in interstate commerce within the Commonwealth and is not subject to the excise imposed by Chapter 63.

4. A foreign corporation engaged in the business of dealing in lumber at wholesale which maintains an office in Massachusetts as the headquarters for three salesmen but which maintains no stock of lumber in Massachusetts and whose orders are filled by shipment direct to the customer in car load lots from stocks situated outside Massachusetts, is engaged exclusively in interstate commerce within the Commonwealth and is not subject to the excise imposed by Chapter 63.

5. A foreign corporation engaged in the business of dealing in lumber at wholesale which keeps its books of account [fol. 20] within the Commonwealth but which maintains no stock of lumber in Massachusetts and whose orders are filled by shipment direct to the customer in car load lots from stocks situated outside Massachusetts, is engaged ex-

clusively in interstate commerce within the Commonwealth and is not subject to the excise imposed by Chapter 63.

6. A foreign corporation engaged in the business of dealing in lumber at wholesale which owns salesmen's automobiles and office furniture situated within the Commonwealth but which maintains no stock of lumber in Massachusetts and whose orders are filled by shipment direct to the customer in car load lots from stocks situated outside Massachusetts, is engaged exclusively in interstate commerce within the Commonwealth, and is not subject to the excise imposed by Chapter 63.

7. A foreign corporation engaged in the business of dealing in lumber at wholesale which maintains one of its several bank accounts within the Commonwealth but which maintains no stock of lumber in Massachusetts and whose orders are filled by shipment direct to the customer in car load lots from stocks situated outside Massachusetts, is engaged exclusively in interstate commerce within the Commonwealth and is not subject to the excise imposed by Chapter 63.

8. A foreign corporation engaged in the business of dealing in lumber at wholesale which holds some of its directors meetings within the Commonwealth but which maintains no stock of lumber in Massachusetts and whose orders are filled by shipment direct to the customer in car load lots from stocks situated outside Massachusetts, is engaged exclusively in interstate commerce within the Commonwealth and is not subject to the excise imposed by Chapter 63.

9. A foreign corporation engaged in the business of dealing in lumber at wholesale which pays one dividend on its [fol. 21] preferred stock by check on a bank account kept within the Commonwealth but which maintains no stock of lumber in Massachusetts and whose orders are filled by shipment direct to the customer in car load lots from stocks situated outside Massachusetts, is engaged exclusively in interstate commerce within the Commonwealth and is not subject to the excise imposed by Chapter 63.

10. The imposition of the excise tax under Chapter 63 of the General Laws on a foreign corporation engaged in the business of dealing in lumber at wholesale which maintains an office in Massachusetts, keeps its books of account in Massachusetts, owns no other tangible property or real

estate in Massachusetts except salesmen's automobiles and office furniture, maintains one of its several bank accounts in Massachusetts, holds some of its directors meetings in Massachusetts and during the year pays one dividend on its preferred stock by check drawn on a bank account in Massachusetts, but which maintains no stock of lumber within the Commonwealth and whose orders are filled by shipment direct to the customer in car load lots from stocks situated outside the Commonwealth, is unconstitutional, in that said tax is a direct burden on interstate commerce in contravention of the Commerce Clause embodied in Section 8 of Article I of the Constitution of the United States.

11. The imposition of the excise tax under Chapter 63 of the General Laws on a foreign corporation engaged in the business of dealing in lumber at wholesale which maintains an office in Massachusetts, keeps its books of account in Massachusetts, owns no other tangible property or real estate in Massachusetts except salesmen's automobiles and office furniture, maintains one of its several bank accounts in Massachusetts, holds some of its directors meetings in Massachusetts and during the year pays one dividend on its preferred stock by check drawn on a bank account in Massachusetts, but which maintains no stock of lumber within the Commonwealth and whose orders are filled by [fol. 22] shipment direct to the customer in car load lots from stocks situated outside the Commonwealth, is unconstitutional, in that it levies a tax upon the property of the said corporation situated without the limits of the Commonwealth of Massachusetts thereby depriving the Appellant of its property without due process of law in contravention of the 14th amendment to the Constitution of the United States.

12. No part of the value of the stock of wholly owned subsidiaries of a foreign corporation doing business in Massachusetts are assets employed in any business within the Commonwealth within the meaning of Chapter 63, Section 4 where such subsidiaries are also foreign corporations and own no property and do no business in Massachusetts.

13. The imposition of an excise tax under Chapter 63 on any part of the value of the stock of wholly owned subsidiaries of a foreign corporation doing business in Massachusetts where such subsidiaries are also foreign corpora-

tions and own no property and do no business in Massachusetts, is illegal and void as an attempt to reach by taxation property which is not within the jurisdiction of the Commonwealth of Massachusetts in violation of the 14th amendment to the Constitution of the United States.

Respectfully submitted, Robert C. McKay, Attorney for Appellant.

[File endorsement omitted.]

[fol. 23] BEFORE BOARD OF TAX APPEALS

PROPOSED FINDINGS OF FACT—Filed Jan. 18, 1934

Now comes the Appellant, by its attorney, Robert C. McKay, and respectfully moves this honorable Board to adopt the following as its findings of fact in the above entitled cause:

1. The Appellant is a foreign corporation, organized and existing under and by virtue of the laws of the State of Delaware, engaged in the business of dealing in lumber at wholesale.

2. The Appellant was, during the years 1931 and 1932, a foreign corporation carrying on business in part in the Commonwealth of Massachusetts and its business so carried on in Massachusetts was exclusively interstate commerce.

3. The Appellant, during the years aforesaid, maintained sales offices at Boston, Massachusetts and Buffalo, New York. The Boston Office was used as a headquarters for three salesmen, who solicited orders in Massachusetts and the other New England States, and for carrying on correspondence and other natural business activities in connection with the receipt of orders and shipments of goods for the New England States. No orders were taken for less than car load lots of lumber and these orders after being passed upon were sent either to the office at Buffalo, New York, where the Appellant's distributing yard for the New England States is located, or to a mill of some subsidiary situated outside the Commonwealth, and the lumber was shipped in car load lots direct to the customers from such

points situated outside the Commonwealth. Remittances from customers in the New England States were made to the Boston Office. No samples or other merchandise were kept in the Commonwealth and no goods were delivered from any store or warehouse in Massachusetts and all goods shipped into Massachusetts were shipped in car load lots from the lumber yards of the Appellant situated outside the Commonwealth. The only tangible property of the Appellant in Massachusetts during the said years was its office [fol. 24] furniture and salesmen's automobiles valued at seven thousand six hundred and eighty-two dollars ($7,682.00). Bank accounts were maintained in Buffalo, New York; Brooklyn, New York; New York City, New York; Boston, Massachusetts; and Toronto, Canada. The corporate books and records were kept at the office in Boston, Massachusetts, and some of the directors meetings were held there.

4. The Appellant on December 31, 1931 owned and held shares of stock in the following corporations organized under the laws of Tennessee, Louisiana and South Carolina:

Stocks	Book-value December 31, 1931
Vestal Lumber Co., Incorporated in Tennessee	$1,180,647.46
Clayton Timber Co., Incorporated in Louisiana	100,000.00
Consolidated Lumber Co., Incorporated in South Carolina	33,859.46*
Total	$1,246,788.00

The Vestal Lumber Company was engaged in the business of cutting timber and manufacturing lumber in Knoxville, Tennessee; Duff, Tennessee; Arkansas City, Arkansas; Sardis, Georgia; and Clayton, Louisiana. It did no business and owned no property in Massachusetts in 1931 or 1932. The total capital stock consisted of one thousand (1000) shares of which nine hundred and ninety-one (991) shares were owned by the Appellant.

The Consolidated Lumber Company was engaged in the business of cutting timber and manufacturing lumber in

* Denotes figures in red ink on Original Copy.

Coward, South Carolina. It owned no property and trans- [fol. 25] acted no business in Massachusetts in 1931 or 1932. All of the capital stock of this corporation was owned by the Appellant.

The Clayton Timber Company held title to timber lands in Clayton, Louisiana and adjacent territory. It owned no property and did no business in Massachusetts in the years 1931 and 1932. All the capital stock of this corporation was owned by the Appellant.

5. The Appellant seasonably filed the return required under Chapter 63 of the General Laws covering its income for the year 1931 accompanied by a protest that it was not liable to the excise tax under said Chapter. On the basis of this return the Appellee assessed an excise tax of $2,512.33 to the Appellant which was computed in the following manner:

Amount of Tax Measured by Net Income

Average value of intangible property in Mass., $8,734. Divide this by average value of all tangible property, $1,557,400; multiply resulting fraction by $56,347.* (⅓ of $169,043.*, Net Loss for Year)	=	$ 314.80*
Wages, salaries, etc., assignable to Mass., $92,899. Divide this by amount of all wages, salaries, etc., $209,640; multiply resulting fraction by $56,347.* (⅓ of $169,043.*, supra)	=	24,970.00*
Gross receipts assignable to Mass., $278,551. Divide this by gross receipts from all business, $2,172,110.; multiply resulting fraction by $56,347.* (⅓ of $169,043.*, supra)	=	7,226.00*
Net Loss Assignable to Massachusetts		$32,510.80
Total according to income		None*

[fol. 26] Amount of Tax Measured by Corporate Excess

Loss assignable to Massachusetts, as above shown, $32,510.80. Divide this by $169,043., (entire apportionable net loss); multiply resulting fraction by $3,086,009, (used for

* Denotes figures in red ink on Original Copy.

total intangible assets and computed by adding the value of stocks in subsidiaries to the value of intangible assets other than securities.) This yields $593,532., which was taken as the value of intangible assets assignable to Massachusetts. The tangible assets, $7,682. were added and $601,214 became the total accepted value of assets assignable to the State.

Cash value of the company's capital stock was fixed at $3,506,625.; all assets, $4,187,748.00. Divide $601,214. by $4,187,748; multiply resulting fraction by $3,506,625.; the result is $503,429. From this the value of motor vehicles in Massachusetts of $964.00 was deducted leaving $502,465. —the "corporate excess." Five dollars per thousand upon this is $2,512.33.

Total Assessment for 1932 ..... $2,512.33

The Appellant seasonably filed a claim for abatement of this tax and paid the tax as assessed on October 20th, 1932. The application for abatement was denied in a notice of disallowance dated May 3rd, 1933.

6. In computing the aforesaid excise tax the Appellee included the value of the three subsidiaries of the Appellant as intangible assets and apportioned 19.233% of their value as assets employed in business in Massachusetts.

Respectfully submitted, Robert C. McKay, Attorney for Appellant.

Dated January 15, 1934.

[File endorsement omitted.]

[fol. 27] BEFORE BOARD OF TAX APPEALS

Docket No. 2633

THE ATLANTIC LUMBER COMPANY

vs.

COMMISSIONER OF CORPORATIONS AND TAXATION

Promulgated May 21, 1934

A foreign corporation whose business was dealing in lumber at wholesale had its principal office and one of its two

sales offices in Boston. Orders from customers in New England were accepted there and remittances from them were received there. Its most active bank account was in Boston, from which its salesmen for New England and such dividends as had been declared were paid. The corporate books and records and securities were kept in Boston. The office of the treasurer was there and directors' meetings were held there. It was held that the corporation was not engaged exclusively in interstate commerce but did some local business in Massachusetts, and hence was subject to the excise imposed by G. L. c. 63, §§ 39-43.

The corporation owned substantially all the capital stocks of subsidiaries, from which it purchased lumber for shipment to its customers. They did no business and owned no property in Massachusetts. It was held that the stocks were not assets employed in business within the Commonwealth, and that no part of their value should be included, in the determination of the corporate excess employed within the Commonwealth by the corporation.

Appeal from a decision of the commissioner refusing to abate an excise tax for the year 1932 assessed to the appellant as a foreign corporation.

The issues are, first, whether the appellant is engaged exclusively in interstate commerce and so not subject to the excise imposed by G. L. c. 63, §§ 39-43, and, secondly, if it is subject to that excise, whether the commissioner erred in determining the corporate excess employed within the Commonwealth by the appellant.

Robert C. McKay, for the appellant.
Henry F. Long, Commissioner, appellee, pro se.

Findings of Fact

The appellant is a foreign corporation, organized under the laws of Delaware. Its principal office is in Boston and it maintains sales offices in Boston and in Buffalo, New York. Its business is dealing in lumber at wholesale. It duly filed an excise tax return for the year 1932. The commissioner found that the appellant had no net income [fol. 28] derived from business carried on within the Commonwealth and determined the corporate excess employed within the Commonwealth to be $502,465. Accordingly he assessed to the appellant an excise in the amount of

$2,512.33, which was paid on October 20, 1932. The appellant seasonably applied for an abatement, claiming that the tax was illegally assessed because its business in Massachusetts was exclusively interstate commerce, and that in computing the appellant's corporate excess employed within the Commonwealth the commissioner had wrongly included a portion of the value of certain securities owned by the appellant in its assets employed in business within the Commonwealth. The application was denied and notice of the commissioner's decision was given on May 3, 1933. The appellant then appealed to this board.

The appellant's Boston office is used as the headquarters for salesmen who solicit orders in Massachusetts and other New England States and in a part of New York State, and for carrying on correspondence and other business activities in connection with the receipt of orders and shipment of goods for that territory. Orders obtained by the salesmen from Boston are accepted at the Boston office and are filled from the appellant's distributing yard at Buffalo, New York, or from the mill of some subsidiary outside Massachusetts. Lumber is shipped directly from those points, always in carload lots, to the customer. Remittances from customers in the New England States are made to the Boston office. No stocks of lumber are kept in Massachusetts. The only tangible property in this State is office furniture and equipment and salesmen's automobiles. The appellant maintains bank accounts in Boston, New York City, Buffalo, Brooklyn and Toronto, Canada, the Boston account being the most active and next to the largest in size. The Boston salesmen are paid from that account. The corporate books and records are kept in Boston, its treasurer is located there, and directors' meetings are held there. Dividends declared on the preferred stock of the appellant have been paid out of the Boston bank account, including two in 1931. No dividends have been paid on the common stock.

[fol. 29] The appellant owns all the stock, except a few shares, of three subsidiaries, the Vestal Lumber & Manufacturing Company, the Consolidated Lumber Company and the Clayton Timber Company. The business of the Vestal and Consolidated companies is the cutting of timber and manufacture of lumber, the former operating in Tennessee, Georgia, Arkansas and Louisiana and the latter in South Carolina. The Clayton company holds title to tim-

ber lands in Louisiana. It manufactures no lumber and does no other business. None of the companies has ever done any business in Massachusetts. The appellant furnishes funds to the subsidiaries when required and they are largely indebted to it. All lumber of the subsidiaries is purchased from them by the appellant, except a small amount sold locally in Tennessee by the Vestal Company, and the purchase price is credited to them. The books of the Clayton and Consolidated companies and the appellant's certificates of stock in the three companies are kept in Boston. The books of the Consolidated company were moved to Boston from South Carolina in June, 1931, and since that time the company has been almost inactive.

The appellant in its return reported the value of the shares of stock of its subsidiaries, at their book values, to be $1,246,788, the value of its other intangibles to be $1,839,221, and the value of its tangible assets employed in business within Massachusetts to be $7,682. The commissioner found that the fair value of the appellant's capital stock was $3,506,626 and that the value of the total assets was $4,187,748. He found that the value of all intangible assets was $3,086,009, including the stocks of subsidiaries, and that the value of tangible assets employed in business in Massachusetts was $7,682. In determining the value of the intangible assets employed in business within Massachusetts the commissioner followed Ruling 2505 of his Rules and Regulations, which provides: "Ordinarily, such proportion of an intangible asset employed in business will be deemed to be employed in business within Massachusetts as that portion of the remainder of income allocable to Massachusetts under the provisions of section 41 of the law bears to the total of said remainder." The proportion so determined under section 41 was .19233. Applying this proportion to the total value of intangible assets, $3,086,009, the commissioner found the value of intangible assets employed in business within Massachusetts to be $593,532. Adding the value of the tangible assets so employed, $7,682, he found the value of the assets, both real and personal, employed in business within the Commonwealth to be $601,214. Applying the rule provided by G. L. c. 63, § 30, cl. 4, he found the proportion of the fair value of the capital stock which the value of the assets employed in business within the Commonwealth bore to the value of the total assets to be $503,429, from which he deducted the value of

[fol. 30]

motor vehicles amounting to $964, leaving $502,465 as the corporate excess employed within the Commonwealth. If in determining the value of intangible assets employed within the Commonwealth the value of the shares of subsidiaries had been omitted, and the proportion .19233 had been applied to the remaining $1,839,221, of intangible assets, the value of intangible assets employed in business within the Commonwealth would have been $353,737, and the corporate excess within the Commonwealth would have been $301,671.

Upon these facts the appellant makes two contentions; first, that it is engaged exclusively in interstate commerce and so was not subject to the excise, and, secondly, that in any event there should not have been included in the assets employed in business within the Commonwealth any part of the stock of its subsidiaries.

We find, for the reasons stated in the opinion below, that the business done by the appellant in Massachusetts was not exclusively interstate commerce, but that it did some local business as well. We find that the appellant's shares of stock in its subsidiaries were not employed in any business within the Commonwealth, and that a fair determination of the value of the intangible assets so employed would have been reached by applying the proportion obtained in accordance with the commissioner's ruling to the value of the remaining intangible assets. Accordingly we find that the amount of the corporate excess employed within the Commonwealth was $301,671. The amount of the excise which should have been assessed is therefore $1,508.36, and the appellant is entitled to an abatement of $1,003.97.

[fol. 31] OPINION

The excise tax imposed by G. L. c. 63, §§ 39-43, is levied "with respect to the carrying on or doing of business by it [a foreign corporation] within the Commonwealth." It has been described as "an excise for the commodity or privilege of having a place of business in Massachusetts with the protection of our laws and the financial, commercial and other advantages appertaining thereto." Judson Freight Forwarding Co. v. Commonwealth, 242 Mass. 47, 51. See Alpha Portland Cement Co. v. Commonwealth, 244 Mass. 530, 547-548. If a foreign corporation transacts only interstate business within the State it is not subject to the

excise. Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203. It is therefore presumed that the Legislature intended the section levying the excise (G. L. c. 63, § 39) to be applicable only to foreign corporations engaged in this Commonwealth in intrastate commerce and so subject to the taxing jurisdiction. W. & J. Sloane v. Commonwealth, 253 Mass. 529, 534. The first question to be decided, therefore, is whether the appellant was engaged exclusively in interstate commerce, or whether it also conducted a local or intrastate business warranting the exaction of an excise.

Unquestionably the negotiation of sales and shipment of lumber, under the circumstances found, are all interstate commerce. Marconi Wireless Telegraph Co. of America v. Commonwealth, 218 Mass. 558, 565. Carlos Ruggles Lumber Co. v. Commonwealth, 261 Mass. 450, 455. Cheney Brothers Co. v. Massachusetts, 246 U. S. 147, 153. But it is plain that the appellant is also doing business in Massachusetts which is not interstate. Its principal office is in Boston. Orders received from customers in New England are accepted at that office and remittances from them are received there. The appellant's most active bank account is in Boston. From that account the salesmen for the New England territory and such dividends as have been declared are paid. The corporate books and records and the certificates of stock of its subsidiaries are kept in Boston. It is inferable that its other securities are kept there also. The office of the treasurer is in Boston and directors' meetings are held there. These activities in our opinion are not [fol. 32] incidental instrumentalities of interstate commerce, but constitute a local business under the decisions. Marconi Wireless Telegraph Co. of America v. Commonwealth, 218 Mass. 558. Old Dominion Co. v. Commonwealth, 237 Mass. 269, 276-278. Carlos Ruggles Lumber Co. v. Commonwealth, 261 Mass. 450, 453. Cheney Brothers Co. v. Massachusetts, 246 U. S. 147. Compare Ozark Pipe Line Corp. v. Monier, 266 U. S. 555, 565-566.

The effect of the decision in Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, in its bearing on the validity of G. L. c. 63, § 39, was considered in W. & J. Sloane v. Commonwealth, 253 Mass. 529, 535, and the conclusion was reached, following Judson Freight Forwarding Co. v. Commonwealth, 242 Mass. 47, that "The excise imposed by § 39 is valid as to all foreign corporations within the natural scope of its words excepting only foreign corporations en-

gaged exclusively in interstate commerce." Section 39 provides that "every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the Commonwealth, an excise equal to the sum of" two factors, of which the first is "An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the Commonwealth," and the second is a percentage of net income, not here material since the appellant had no net income. "Corporate excess employed within the Commonwealth" by a foreign corporation is defined by G. L. c. 63, § 30, cl. 4, as "such proportion of the fair value of its capital stock on the last day of the taxable year * * *, as the value of the assets, both real and personal, employed in any business within the Commonwealth on that date, bears to the value of the total assets of the corporation on said date," less the value of certain tangible property and securities described in subdivisions (a) and (b) thereunder. We have found that the stocks in the subsidiary corporations owned by the appellant were not employed in any business within the Commonwealth and should not have been included by the commissioner among the assets apportioned in accordance with his ruling. They were not employed in any real sense as an instrumentality for carrying on business in Massachusetts, but were the means, through the control of the corporations which they [fol. 33] gave, of enabling the appellant to acquire and ship, from points outside the State, the lumber needed for delivery to its customers.

The case is very different from National Leather Co. v. Commonwealth, 256 Mass. 419. In that case the petitioner was a foreign corporation doing a local business wholly in Massachusetts, which owned substantially all the stock of two subsidiaries, doing business and owning property largely in this State, and the petitioner made use of the activities of the subsidiaries as essential parts of its local business. It was held that, in computing under G. L. c. 63, § 30, cl. 4, the corporate excess employed within the Commonwealth for the purpose of assessing an excise tax under § 39, it was proper to include the stock of the subsidiaries as assets employed by the petitioner in business within the Commonwealth. The decision was affirmed in National Leather Co. v. Massachusetts, 277 U. S. 413, 422, 423. In the opinion the court said: "On the contrary, looking to the substance of the transactions and not merely to form, we think that the

petitioner, through its ownership of the capital stock of the two subsidiary corporations and the control which it thereby exercised over them, did, in a very real and practical sense, employ these stocks as an instrumentality in carrying on its business within Massachusetts—to the extent, at least, that the controlled activities and property of the subsidiary corporations were within the State." Here, on the other hand, all the business and property of the subsidiaries were outside Massachusetts. It follows that no part of the value of their stock owned by the appellant should be included in the value of the assets employed in business within the Commonwealth, in determining the appellant's corporate excess employed within the Commonwealth. Our computation of the amount of that corporate excess, of the excise which should have been assessed and of the abatement to which the appellant is entitled, has been made on that basis.

The appellant has filed requests for findings and requests for rulings. As to the requests for findings, those numbered 1, 3 and 6 are given, 2 is refused, and 4 and 5 are refused except as found herein. All the requests for rulings are [fol. 34] refused. As for 12 and 13 we think we should not go further than the rulings contained in this opinion.

Decision for the appellant; abatement granted in the amount of $1,003.97, with costs.

BEFORE BOARD OF TAX APPEALS

CLAIM OF APPEAL—Filed June 8, 1934

Now comes the Appellant, by its attorney, Robert C. McKay, and claims an appeal to the Supreme Judicial Court of this Commonwealth from the decision of the Board of Tax Appeals promulgated May 21st, 1934 refusing an abatement to the Appellant as prayed for in its petition. This appeal is claimed by reason of the following errors of law alleged to have been made by the Board of Tax Appeals:

1. The Board of Tax Appeals is in error (second paragraph of Opinion, second sentence) in its conclusion:

"But it is plain that the Appellant is also doing business in Massachusetts which is not interstate."

2. The Board of Tax Appeals is in error (second paragraph of Opinion, last sentence) in its conclusion:

"These activities in our opinion are not incidental instrumentalities of interstate commerce, but constitute a local business under the decisions."

3. The Board of Tax Appeals is in error in its conclusion that the imposition of a tax under Chapter 63 of the General Laws on the Appellant is valid and not unconstitutional as a direct burden on interstate commerce in contravention of the Commerce Clause embodied in Section 8 of Article I of the Constitution of the United States.

4. The Board of Tax Appeals is in error in its conclusion that the imposition of the tax under Chapter 63 of the General Laws on the Appellant is valid and not unconstitutional [fol. 35] as a tax upon the property of the Appellant situated without the limits of the Commonwealth of Massachusetts thereby depriving the Appellant of its property without due process of law in contravention of the 14th amendment to the Constitution of the United States.

5. The Board of Tax Appeals is in error in refusing the Appellant's Requests for Rulings of Law numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11.

The Atlantic Lumber Company, by its attorney,
Robert C. McKay.

Filed June 22, 1934.

[File endorsement omitted.]

[fol. 36] BEFORE BOARD OF TAX APPEALS

AFFIDAVIT OF SERVICE OF CLAIM OF APPEAL AND NOTICE OF ENTRY OF APPEAL

I, Robert C. McKay, in behalf of The Atlantic Lumber Company, hereby make affidavit that I served by registered mail upon the Commissioner of Corporations and Taxation, the adverse party in this proceeding, copies of claim of appeal and notice of entry appeal, as required by G. L. (Ter. Ed.) C. 58 (a), Sec. 13.

Robert C. McKay.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Then personally appeared the above named Robert C. McKay and made oath that the above affidavit subscribed by him is true to the best of his knowledge and belief

Madalene MacWhinnie, Notary Public. My commission expires Oct. 19, 1939. (Seal.)

June 26, 1934.
Filed June 26, 1934.

[fol. 37] IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

OPINION

RUGG, C. J.:

This is an appeal from a decision by the Board of Tax Appeals. G. L. (Ter. Ed.) c. 58A, § 13, as most recently amended by St. 1933, c. 321, § 7, and c. 350, § 8. By that decision a partial abatement of the excise tax of the taxpayer was granted about which no question now is raised; but the claim for abatement of the entire tax was denied. The single issue presented is whether the tax constituted a burden upon the interstate commerce of the taxpayer so as to be beyond the power of the Commonwealth and an infringement upon the powers vested exclusively in the United States, and was a deprivation of its property without due process of law.

The facts are these: The taxpayer is a corporation organized under the laws of Delaware. Its business is dealing in lumber at wholesale. Its principal office is in Boston in this Commonwealth. It maintains sales offices in Boston and in Buffalo in the State of New York. Its Boston office is used as the headquarters of salesmen who solicit orders in this Commonwealth, in other New England States and in a part of the State of New York, and for carrying on correspondence and other business activities in connection with the receipt of orders and shipment of goods for that territory. Orders obtained by such salesmen are accepted at the Boston office and are filled from the distributing yard of the taxpayer at Buffalo, or from the mill of some subsidiary outside of this Commonwealth. Lumber is shipped from those points, always in carload lots, directly to the

customer. Remittances from customers in the New England States are made to the Boston office. No stocks of lumber are kept in this Commonwealth. The only tangible [fol. 38] property kept in this Commonwealth is office furniture and equipment and salesmen's automobiles. Bank accounts are maintained in Boston, in Brooklyn, Buffalo and New York in the State of New York, and in Toronto in Canada. The Boston account is the most active and next to the largest in amount. The Boston salesmen are paid from that account. The corporate books and records are kept in Boston, the treasurer is located there, and directors' meetings are held there. Dividends on the preferred stock have been paid out of the Boston bank account, including two in 1931. No dividends have been paid on the common stock. The taxpayer had no net income derived from business carried on within the Commonwealth. The corporate excess employed within this Commonwealth was determined by the defendant and the excise calculated on it was paid by the taxpayer. No contention is made that in these particulars the statutory provisions were not followed or that the calculations were not correct.

The tax here assailed was levied under G. L. (Ter. Ed.) c. 63, §§ 39-43. Its essential provisions are that a "foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the Commonwealth, an excise equal to the sum" of a percentage on the corporate excess employed by it in this Commonwealth and a percentage on its net income attributable to business done in this Commonwealth. The second of these two factors may be disregarded in the case at bar, since the taxpayer had no such income and no part of the excise assessed had any reference to such income.

The true character of the tax thus authorized now is settled. It is confined solely to foreign corporations doing intrastate business within the Commonwealth. It does not [fol. 39] apply to those engaged exclusively in interstate commerce. It is not a franchise tax on the right to exist as a corporation. It is not a tax on tangible or other property.

It is not an income tax. It is measured by property and net income fairly attributable to the business done within the Commonwealth. It is an excise for the commodity or privilege of having a place for the transaction of intrastate business in Massachusetts with the protection of our laws and the financial, commercial and other advantages apper-

taining thereto. Judson Freight Forwarding Co. v. Commonwealth, 242 Mass. 47, 51. W. & J. Sloane v. Commonwealth, 253 Mass. 529, 532. Carlos Ruggles Lumber Co. v. Commonwealth, 261 Mass. 450, 452-453. Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 213-216.

The first point for decision is whether upon the facts already recited the taxpayer was carrying on intrastate business within the Commonwealth, or whether its business activities were confined exclusively to interstate commerce. Doubtless certain of its activities were interstate commerce; but others were not. The principal office of the taxpayer was in Boston. Its most active bank account was there. Corporate books and records were kept there; the location of its treasurer with all its implications was there; the dividends were paid and the meetings of its directors were held there. These are corporate functions which are not interstate commerce. That this constituted local and intrastate business which subjected the foreign corporation to the excise tax of this Commonwealth seems to us to be settled by the decision in Cheney Brothers v. Massachusetts, 246 U. S. 147, where at pages 155, 156 was affirmed the decision of this court in Marconi Wireless Telegraph Co. v. Commonwealth, 218 Mass. 558, 576-579, as to the [fol. 40] Copper Range Company and the Champion Copper Company. Those cases related to an earlier excise tax statute than the one here involved, but the decision turned on the precise point here raised, whether the business subjected to the tax was local or interstate commerce. The objections to that tax were based on the commerce clause of the Federal Constitution and on the due process and equal protection clauses of the Fourteenth Amendment. The entire decision of the United States Supreme Court with reference to those two corporations was in these words: "Copper Range Company This is a Michigan corporation whose articles of association contemplate that it shall have an office in Boston. It is a holding company and owns various corporate stocks and bonds and certain mineral lands in Michigan. Its activities in Massachusetts consist in holding stockholders' and directors' meetings, keeping corporate records and financial books of account, receiving monthly dividends from its holdings of stock, depositing the money in Boston banks and paying the same out, less salaries and expenses, as dividends to its stock-

holders three or four times a year. The exaction of a tax for the exercise of such corporate faculties is within the power of the State. Interstate commerce is not affected. Champion Copper Company. This is another Michigan corporation which maintains an office in Boston pursuant to a provision in its articles of association. It deposits the proceeds of its mining and smelting business in Michigan in Boston banks and, after paying salaries and expenses, distributes the balance in dividends from its Boston office. The management of its mine is under the control of a general manager in Michigan and he in turn is under the control of the company's directors. The meetings of the latter, which occur several times a year, are held [fol. 41] in the Boston office. At these meetings the directors receive reports from the treasurer and general manager, vote dividends, elect officers, and authorize the execution of deeds and the like for lands in Michigan. These corporate activities in Massachusetts are not interstate commerce and may be made the basis of an excise tax by that State." The decision of those two cases on this point has been cited with approval. Ozark Pipe Line Corp. v. Monier, 266 U. S. 555, 566, 567. Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 217. It was said of it in a dissenting opinion in Cudahy Packing Co. v. Hinkle, 278 U. S. 460, 468: "That decision was made by a unanimous Court after much deliberation. It has never been disapproved." We are unable to perceive any difference in the facts of those cases and those in the one at bar. So far as concerns the essential character of the tax statutes involved in those cases and in the case at bar, it is the same. To the same effect in principle are Old Dominion Co. v. Commonwealth, 237 Mass. 269, 276-278, and Carlos Ruggles Lumber Co. v. Commonwealth, 261 Mass. 450. The case at bar seems to us quite distinguishable from Cheney Brothers Co. v. Massachusetts, 246 U. S. 147, 153-154, reversing 218 Mass. 558, 569-573.

The taxpayer relies strongly upon Ozark Pipe Line Corp. v. Monier, 266 U. S. 555. In that case a corporation organized under the laws of Maryland operated a pipe line from Oklahoma through Missouri to a point in Illinois, through which crude petroleum was conducted. No oil was received or delivered in Missouri. The principal office of the corporation was maintained in Missouri, and its bank

accounts and books were there. It does not appear that its directors' meetings were held in Missouri, that its treasurer was located there, or that its dividends were paid there. The court in its opinion stressed the fact that the [fol. 42] corporate activities at the Missouri office were solely in furtherance of interstate transportation of oil in the pipe line. In holding that the franchise tax levied by the State of Missouri was invalid as a burden on interstate commerce, the cases in 246 U. S. 147, 155-156 (to which we have already adverted) were affirmed by stating at page 566: "The fourth and fifth were mining companies operating mines in Michigan with offices in Boston where their directors met, declared and paid dividends, etc. Interstate commerce was not affected." In the case at bar these activities and others constituting the corporate life of the taxpayer were carried on in this Commonwealth. In Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218, the State franchise tax held repugnant to the Federal Constitution was imposed upon a New York corporation with its principal offices in New York, and only an importing business in Alabama.

The tax in the case at bar may have some remote effect upon the business of the taxpayer, but no more than that of any local ad valorem tax which under established principles may be placed upon tangible and intangible property within the Commonwealth without so burdening interstate commerce as to be an interference with the Federal power of regulation. In Virginia v. Imperial Coal Sales Co. Inc. 293 U. S. 15, a "capital tax" computed upon the value of stock on hand, excess of bills and accounts receivable over bills and accounts payable, cash on hand and on deposit, and other intangibles located in Virginia, was sustained. The local business appears to have been inseparable from its interstate business which was selling coal for foreign coal mining corporations, none of any consequence being located or sold in Virginia. The effect of the excise on the taxpayer in the circumstances disclosed in the instant case [fol. 43] is as remote from interstate commerce as in the Virginia case. It is based upon that proportion of its tangibles and intangibles deemed to be employed in this Commonwealth. The effect upon interstate commerce is at most incidental and remote. The fact that it may be paid from profits derived from interstate commerce does not render

it a burden on such business. Edelman v. Boeing Air Transport, Inc. 289 U. S. 249.

It has not been argued in behalf of the taxpayer that its intrastate business is inseparable from its interstate business. Therefore, that question need not be considered. One single point urged on this aspect of the case is that the taxpayer does no intrastate business.

Another contention of the taxpayer is that it has been deprived of property without due process of law. The tax, as already demonstrated, is in both form and substance an excise and not a property tax. The aim of the statute is to measure the excise by property correctly determined to be allocated to the business in this Commonwealth. The taxpayer does not point out any property outside the Commonwealth which has been taxed. A part of its intangibles, such as cash and deposits in banks, without question is allocable to Massachusetts. No foundation is found in the facts presented for the contention that property not having a situs in the Commonwealth has been taxed. The taxpayer cannot upon this record question the allocation made by the defendant. Alpha Portland Cement Co. v. Commonwealth, 248 Mass. 156.

The excise here assailed conforms to the test recently laid down in Cooney v. Mountain States Telephone & Telegraph Co. 294 U. S. 384, at page 393, in these words: "Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is [fol. 44] imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business."

The conclusion is that the abatement is granted in the sum found by the Board of Tax Appeals with costs, and that the costs of this appeal are to be assessed against The Atlantic Lumber Company. G. L. (Ter. Ed.) c. 58A, § 13, as amended by St. 1933, c. 321, § 7.

So ordered.

[fol. 45] IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESCRIPT—Filed Sept. 17, 1935

In the Case of

ATLANTIC LUMBER COMPANY

vs.

COMMISSIONER OF CORPORATIONS AND TAXATION

pending in the Supreme Judicial Court for the County of Suffolk:

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—

Abatement granted in the sum found by the board of tax appeals, with costs; and costs of this appeal to be assessed against the Atlantic Lumber Company.

By the Court.

Walter F. Frederick, Clerk.

September 12, 1935.

Brief Statement of the Grounds and Reasons of the Decision

The reasons of the decision are set forth at length in the opinion, filed with the Reporter of Decisions, to which reference is made.

[fol. 46] IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

THE ATLANTIC LUMBER CO.

v.

COMMISSIONER OF CORPORATIONS AND TAXATION

FINAL ORDER

An abatement of an excise for the year 1932 is granted to the appellant, The Atlantic Lumber Co., in the sum of $1,003.97, this sum to bear interest at the rate of 6% per annum from October 20, 1932; the appellant, The Atlantic Lumber Co., is also to recover its costs before the Board of

Tax Appeals to be taxed by said board, and the total of such amounts shall be paid to the appellant, The Atlantic Lumber Co., by the State Treasurer.

And it is further ordered that the costs of the appeal in the Supreme Judicial Court in the sum of $25.19 are to be paid to the appellee, the Commissioner of Corporations and Taxation, by the appellant, The Atlantic Lumber Co., and that execution shall issue therefor.

By the Court (Lummus, J.):

Charles S. O'Connor, Clerk.

Entered December 3, 1935.

[fol. 47] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS TO THE SUPREME COURT OF THE UNITED STATES—Filed Dec. 24, 1935

To the Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts:

Your Petitioner, The Atlantic Lumber Company, respectfully shows:

1. Your Petitioner is the Appellant in the above entitled cause.

2. Your Petitioner seasonably filed an application for the abatement of the Massachusetts Corporate Excise Tax assessed to your Petitioner for the year 1932 under Chapter 63 of the General Laws of the Commonwealth of Massachusetts. This application was denied by the Commissioner of Corporations and Taxation on May 3, 1933 and your Petitioner duly filed an appeal from this decision with the Massachusetts Board of Tax Appeals. In this appeal the validity of said Chapter 63 of the General Laws, as amended, was drawn in question on the ground that the said statute was repugnant to the Constitution of the United States. On May 21, 1934, the Massachusetts Board of Tax Appeals promulgated a decision in favor of your Petitioner to the extent that a partial abatement of the

[fol. 48] excise tax of the Petitioner was granted, about which no question is now raised, but the contention of the Petitioner that the entire tax was invalid was denied and the decision was in favor of the validity of said Chapter 63 of the General Laws.

3. An appeal from said decision to the Supreme Judicial Court of the Commonwealth of Massachusetts was taken and the decision of the Massachusetts Board of Tax Appeals was affirmed by said Supreme Judicial Court in an opinion dated the 16th day of September, 1935 and a final order in accordance with said opinion was entered on December 3, 1935.

4. The Supreme Judicial Court of the Commonwealth of Massachusetts is the highest court of said Commonwealth in which a decision in this suit may be had.

5. In said cause there is drawn in question the validity of a statute of the Commonwealth of Massachusetts on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity, in that Chapter 63 of the General Laws of the Commonwealth of Massachusetts, as amended, has been held valid and not in violation of the Constitution of the United States in that it levies a tax that is a direct burden on interstate commerce in contravention of the Commerce Clause embodied in Section 8 of Article I of the Constitution of the United States; and in that said Chapter 63 of the General Laws of the Commonwealth of Massachusetts, as amended, has been held valid and not in violation of the Constitution of the United States in that it levies a tax upon the property of your Petitioner situated without the limits of the Commonwealth of Massachusetts thereby depriving your Petitioner of its property without due process of law in contravention of the 14th Amendment to the Constitution of the United States.

[fol. 49] 6. Your Petitioner, therefore, respectfully shows this Court that in accordance with sec. 237 (a) of the Judicial Code and in accordance with the Rules of the Supreme Court of the United States, the case is one which, under the legislation in force when the Act of January 31st, 1928 was passed, to wit, under sec. 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States as a matter of right on a writ of error.

7. The errors on which your Petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors, filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is likewise filed, herewith, a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your Petitioner prays for the allowance of an appeal from said Supreme Judicial Court of the Commonwealth of Massachusetts to the Supreme Court of the United States, in order that the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Judicial Court of the Commonwealth of Massachusetts may be sent to the Supreme Court of the United States as provided by law, and that an order be made touching the security to be provided by the Petitioner, and that the bond tendered by the Petitioner be approved.

(Signed) Robert C. McKay, Attorney for Petitioner.

[fol. 49½] [File endorsement omitted.]

[fol. 50] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed Dec. 24, 1935

The Petitioner assigns the following errors in the record and proceedings in this cause:

1. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in holding and deciding that the tax imposed by Chapter 63 of the General Laws of the Commonwealth of Massachusetts was applicable to your Petitioner by reason of which it has in effect held that said tax may be imposed on a foreign corporation engaged exclusively in interstate commerce within the Commonwealth of Massachusetts and that such construction would

not be in violation of the Commerce Clause embodied in Section 8 of Article I of the Constitution of the United States.

2. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in holding and deciding that the tax imposed by Chapter 63 of the General Laws of the Commonwealth of Massachusetts was applicable to your Petitioner by reason of which it has in effect held that said tax may be imposed on a foreign corporation engaged exclusively in interstate commerce within the Commonwealth of Massachusetts and that such construction would not be in violation of the 14th Amendment to the Constitution of the United States.

[fol. 51] 3. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in holding and deciding that the method of allocating the intangible assets of the Petitioner adopted by the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts was a reasonable method of allocating the value of said intangible assets for the purpose of the tax imposed by Chapter 63 of the General Laws of the Commonwealth of Massachusetts by reason of which it has in effect held that said tax may be imposed on the interstate business of a foreign corporation and that such construction would not be in violation of the Commerce Clause embodied in Section 8 of Article I of the Constitution of the United States.

4. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in holding and deciding that the method of allocating the intangible assets of the Petitioner adopted by the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts was a reasonable method of allocating the value of said intangible assets for the purpose of the tax imposed by Chapter 63 of the General Laws of the Commonwealth of Massachusetts by reason of which it has in effect held that the said tax may be imposed on property of a foreign corporation situated without the limits of the Commonwealth of Massachusetts and that such construction would not be in violation of the 14th Amendment to the Constitution of the United States.

5. In said suit there was drawn in question the validity of Chapter 63 of the General Laws of the Commonwealth

of Massachusetts on the ground that it was repugnant to the Constitution of the United States in that it levied a tax that is a direct burden on interstate commerce in contra-
[fol. 52] vention of the Commerce Clause embodied in Section 8 of Article I of the Constitution of the United States, and the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts was in favor of the validity of said statute, which decision is hereby assigned as error.

6. In said suit there was drawn in question the validity of Chapter 63 on the ground that it was repugnant to the Constitution of the United States in that it levied a tax against property situated without the limits of the Commonwealth of Massachusetts in contravention of the 14th Amendment to the Constitution of the United States, and the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts was in favor of the validity of said statute which decision is hereby assigned as error.

Wherefore, on account of the errors hereinbefore assigned, your Petitioner prays that the said order of the Supreme Judicial Court of the Commonwealth of Massachusetts dated the 3rd day of December, 1935, in the above entitled cause, in so far as it denies the abatement of the entire tax assessed to your Petitioner under Chapter 63 of the General Laws of the Commonwealth of Massachusetts, be reversed and an order be entered in favor of this Appellant.

(Signed) Robert C. McKay, Attorney for Appellant.

[fol. 52½] [File endorsement omitted.]

[fol. 53] Supreme Court of the United States

[Title omitted]

Order Allowing Appeal—Filed Dec. 24, 1935

The Appellant in the above entitled cause having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the order made and entered in the above entitled cause by the Supreme Judicial Court of the Commonwealth of Massachusetts on the 3rd

day of December, 1935 and having presented and filed its petition for appeal, assignments of error, prayer for reversal, and statement as to jurisdiction, pursuant to the statutes and Rules of the Supreme Court of the United States in such case made and provided:

It is now ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Judicial Court of the Commonwealth of Massachusetts in the above entitled cause, as provided by law and it is further ordered that the Clerk of the Supreme Judicial Court of the Commonwealth of Massachusetts should prepare and certify a transcript of the record, proceedings and order in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said court within forty (40) days of this date.

[fol. 54] And it is further ordered that security for costs on appeal be fixed in the sum of $500.

Dated December 20, 1935.

Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts.

[fol. 54½] [File endorsement omitted.]

[fols. 55 & 56] Bond on appeal for $500.00, approved and filed Dec. 24, 1935, omitted in printing.

[fols. 57 & 58] Citation, in usual form, showing service on James J. Ronan, filed Dec. 24, 1935, omitted in printing.

[fol. 58½] [File endorsement omitted.]

[fol. 59] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed Jan. 14, 1936

It is hereby stipulated and agreed by and between Robert C. McKay, Attorney for The Atlantic Lumber Company,

above named, and James J. Ronan, Attorney for Commissioner of Corporations and Taxation, above named, that the portions of the record which shall constitute the transcript of record on appeal to the Supreme Court of the United States herein shall consist of the following:

1. Printed copy of record on appeal to Supreme Judicial Court from the Massachusetts Board of Tax Appeals including photostatic copy of tax return filed by The Atlantic Lumber Company.
2. Opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts, dated September 16, 1935.
3. Rescript.
4. Final order of Supreme Judicial Court entered December 3, 1935.
5. Petition for Appeal from the Supreme Judicial Court of the Commonwealth of Massachusetts to the Supreme Court of the United States.

[fol. 60] 6. Assignment of Errors and Prayer for Reversal.

7. Order Allowing Appeal.
8. Statement as to Jurisdiction.
9. Bond on Appeal.
10. Original of Citation on Appeal.
11. Notice under Rule 12.
12. This Stipulation.

This stipulation is made and entered into pursuant to Rule 10 of the Rules of the Supreme Court of the United States.

Dated this 10th day of January, 1936.

Robert C. McKay, James J. Ronan, Asst. Atty. Gen.

[fol. 60½] [File endorsement omitted.]

[fol. 61] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Jan. 25, 1936

Comes now the Appellant in the above entitled cause and adopts its Assignment of Errors as its statement of points.

to be relied upon and states that the whole of the record, as filed, is necessary for the consideration of the case.

Dated at Boston, Massachusetts, January 24, 1936.

Robert C. McKay, Attorney for Appellant.

Service of the above and foregoing statement is hereby admitted and receipt of a copy thereof acknowledged this 25th day of January, 1936.

James J. Ronan, Asst. Atty. Gen. of Mass., Counsel for Appellee.

[fol. 62] [File endorsement omitted.]

Endorsed on cover: File No. 40,269. Massachusetts Supreme Judicial Court. Term No. 715. The Atlantic Lumber Company, appellant, vs. Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts. Filed January 24, 1936. Term No. 715, O. T., 1935.